No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Federal Circuit resolved this case solely on the basis of *Auer* deference; the court of appeals ruled in favor of the VA merely because "neither party's position" was "unreasonable." Pet. App. 17a. This is thus a compelling vehicle to revisit *Auer*, a doctrine that the government conspicuously does not defend. In fact, the government acknowledges that the viability of *Auer* is an "important" question "that may warrant this Court's review." Opp. 10.

Rather than endorse the decision below, the government opposes certiorari with an argument neither addressed nor adopted by the court of appeals. The government contends that it would prevail even under a *de novo* construction of the relevant regulation. This contention is doubly flawed.

First, it is no reason to deny review. Because the government relied on *Auer* below, and because it was the sole basis on which the Federal Circuit ruled, this case presents a clean opportunity for the Court to revisit that doctrine. Whether the government would win without *Auer* is a subsequent question. Indeed, the Court may leave that issue for remand.

Second, the government's construction of Section 3.156(c) is flatly wrong. The government seeks to erect a limitation on a veteran's claim for benefits that exists nowhere in the regulatory text. Petitioner's construction, by contrast, accords with the regulation's plain meaning. The question is certainly substantial enough to warrant resolution.

The Court should resolve whether an agency's interpretation of its own regulation deserves deference. This case is an appropriate vehicle for doing so.

1. In opposing certiorari, the government advances effectively one argument: that it would prevail even absent *Auer*. See Opp. 10-23. In making this argument, the government expressly rejects the Federal Circuit's reasoning. Although the court of appeals held that both parties advanced reasonable constructions of the regulation (Pet. App. 17a), the government now contends that its position is "not simply the *better* reading of the rule, but the *only* permissible construction." Opp. 20.

While the government is wrong substantively, its quarrel with the opinion below is no reason to deny review. As the government underscores (Opp. 24), the Court ordinarily does not "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). The Court routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason. See, *e.g.*, *Department of Transp.* v. *Association of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (leaving for remand alternative grounds); *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) (same).

That is the proper course here. The Court should review the issue that governed below—*Auer*. If the Court reverses *Auer*, it may leave *de novo* construction of Section 3.156(c) for remand. When the Court "reverse[s] on a threshold question," it "typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky*, 566 U.S. at 201. See also, *e.g.*, *Bond* v. *United States*, 564 U.S. 211, 214 (2011).

The Court should be especially skeptical of the government's argument opposing certiorari given the history of this case. The court of appeals relied on *Auer* because the government asked it to do so. Below, quoting *Seminole Rock*, the government argued that "an agency's construction of its own regulations is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Gov't C.A. Br. 28. The government ultimately contended that "the VA's interpretation of [Section] 3.156(c)(1) * * * is entitled to deference." *Id.* at 29. Earlier in this case, the government thought *Auer* was relevant. In resting its decision on *Auer*, the court of appeals agreed.

Having expressly embraced—and won with—*Auer* deference below, the government's current effort to distance this case from *Auer* rings hollow. The government's decision to abandon the argument it advanced earlier is all the more reason why this Court's review is warranted. Otherwise, the government will continue to use *Auer* offensively in the lower courts but then avoid review by contending before this Court that it might have won regardless.

The government's reference (Opp. 20) to Justice Scalia's concurring opinion in *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U.S. 50, 67 (2011), is misplaced. There, Justice Scalia explained why he did not suggest revisiting *Auer* at that time: "We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so." *Id.* at 69. Petitioner asks the Court to reconsider *Auer*.

The government makes a second, half-hearted vehicle argument. Opp. 22-23. It recognizes our contention that the Court should revisit *Auer*, in part,

because *Auer* encourages agencies to write vague regulations and then supply content to those regulations via interpretive decisions that are not subject to notice-and-comment rulemaking. See Pet. 15-16. In this way, *Auer* deference allows agencies to circumvent the critical safeguards contained in the Administrative Procedure Act. *Ibid.*

The government rejoins by insisting that this is a mere "procedural rule[]" and that "it is well established that agencies may adopt and interpret such rules through adjudications without resorting to rulemaking." Opp. 23. But Section 3.156(c) is not merely a "procedural rule"—its construction governs whether petitioner, and all those like him, are entitled to retroactive disability benefits. Indeed, the agency itself thought that the promulgation of Section 3.156(c) was subject to the notice-and-comment requirements of the APA; the agency *did* subject the regulation to notice-and-comment. See *New and Material Evidence*, 70 Fed. Reg. 35,388 (June 20, 2005).

This case therefore highlights a fundamental defect of *Auer*. The agency promulgated a vague regulation using APA notice-and-comment rulemaking; then, without notice-and-comment, the agency changed the regulation's meaning; and, finally, the agency defended its action via reliance on *Auer* deference. This Court should revisit *Auer* to foreclose this circumvention of the APA.[1]

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[1] The second question presented is no obstacle to review. Cf. Opp. 22 n.5. The question of which comes first—*Auer* deference or the pro-veteran canon—presupposes the existence of *Auer* deference. Per the petition, the second question is relevant only if the Court "retains *Auer*." Pet. 23.

2. The government's construction of Section 3.156(c) is flatly wrong. The government disregards core aspects of the regulatory text, and its policy-based arguments are irreconcilable with the regulation's plain meaning. The question certainly warrants resolution without *Auer* deference.

The VA may revisit past denials of benefits by either "reopen[ing]" a claim pursuant to 38 C.F.R. § 3.156(a) or "reconsider[ing]" a claim pursuant to 38 C.F.R. § 3.156(c). The latter procedure is more favorable to veterans because it results in retroactive benefits. Compare 38 C.F.R. § 3.400(q)(2), with *id.* § 3.156(c)(3).

The reconsideration process is limited to circumstances where "relevant official service department records" existed at the time of the claim but had not been "associated" with the claim—and thus were not considered. 38 C.F.R. § 3.156(c)(1). That is to say, the more veteran-friendly provision applies when the VA made an "administrative error" (Opp. 19) by failing to consider "relevant" records that the government possessed at the time of its initial decision.

a. In petitioner's view, Section 3.156(c)(1) means just what it says: if the VA failed to consider records in the government's possession "relevant"[2] to an element of the claim determination, the VA will reconsider its past denial. 38 C.F.R. § 3.156(c)(1). If the VA later awards benefits, based at least "in part" on the relevant records the VA failed to previously evaluate, then the veteran is entitled to retroactive benefits. *Id.* § 3.156(c)(3). See also Pet. 21. Nothing in the

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[2] "Relevant" is properly understood as "any tendency to make a fact more or less probative." Fed. R. Evid. 401; Pet. 22.

regulation provides additional qualification on what constitutes a "relevant" record.

Two aspects of the regulatory text compel the conclusion that petitioner is entitled to the benefit of Section 3.156(c)(1).

First, the records at issue here are "relevant" in the ordinary sense of the term. Petitioner's "Combat History, Expeditions, and Awards Record," for example, documents "his participation in Operation Harvest Moon" (Pet. App. 4a), which is the military operation that caused his PTSD (see *id.* at 3a). This record is certainly "relevant" (38 C.F.R. § 3.156(c)(1)) to "the presence of an in service stressor," which is an essential element of the disability claim. Pet. App. 16a. See also Pet. 21; 38 C.F.R. § 3.304(f) ("Service connection for posttraumatic stress disorder requires * * * credible supporting evidence that the claimed in-service stressor occurred.").[3]

The regulation itself, moreover, specifies that these records qualify as "relevant." Section 3.156(c)(1)(i) provides that "relevant official service department records" include "[s]ervice records that are related to a claimed in-service event." 38 C.F.R. § 3.156(c)(1)(i). The records the VA overlooked here are just that—service records related to the in-service event that caused petitioner's PTSD. The regulation thus directly states that these records qualify as "relevant." We made this argument earlier (Pet. 21), but the government fails to respond. Its inability to

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[3] The government is wrong to assert (Opp. 16-17) that the evidence here does not meet our test. A veteran must demonstrate an in-service stressor to obtain benefits (38 C.F.R. § 3.304(f)), and these records are plainly "relevant" to that element.

muster a response to the regulation's plain text speaks volumes.

Second, in granting petitioner benefits, the VA's decision *was* "based" "in part" on the records the VA previously failed to associate with petitioner's claims file. 38 C.F.R. § 3.156(c)(3). On March 25, 2009, the VA issued petitioner a "Decision Review Officer Decision." C.A. App. 41-45. That decision was expressly based on "consideration and review of the evidence of record." *Id.* at 43. Under a section titled "evidence," the VA identified that the evidence of record included petitioner's "DD Form 214," a "copy of service personnel record," and a "copy of citation for heroic participation in Operation Harvest Moon." *Id.* at 42. These are the overlooked records at issue. See Pet. 6. The government even acknowledges that the VA relied, at least in part, on these records when it awarded petitioner benefits. Opp. 16 n.2 (admitting that "petitioner's combat service was 'verified' based on the service department records") (quoting C.A. App. 30).[4] Section 3.156(c)(3) therefore confirms that petitioner is entitled to retroactive benefits.

With our construction, Section 3.156(c) yields a sensible, easy-to-administer rule. If the VA earlier committed an administrative error by overlooking records the government possessed "relevant" to an

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[4] The government attempts to escape the implication of its concession by contending that its asserted "interplay between paragraphs (c)(1) and (3) is not directly implicated in this case." *Ibid.* We do not understand what this phrase is intended to mean. The VA's decision awarding petitioner benefits was "based * * * in part on" records that the VA earlier overlooked. 38 C.F.R. § 3.156(c)(3). This should be conclusive of the operative question here.

element of the veteran's claim, the veteran should receive retroactive benefits when the VA later grants a disability claim based at least "in part" on those overlooked records. This veteran-friendly regulation remediates past errors made by the VA.

b. The government, however, seeks to engraft an additional, causative element onto the regulation. In the government's view, a veteran is entitled to the benefit of Section 3.156(c) only if the veteran proves that the VA would have granted the veteran benefits if it had considered the record at issue. Opp. 12-15, 18-19. The government would require a speculative, counterfactual inquiry whenever a veteran invokes Section 3.156(c). There is no textual basis for erecting this extra hurdle to a veteran's claim for benefits.

Rather than starting with the text, the government begins with an apparent policy argument. Opp. 13-15. The government argues (Opp. 14) that the VA denied petitioner's claim in 1983 because it found "that a diagnosis of PTSD was not warranted." Pet. App. 43a. The government asserts that records describing "petitioner's combat service"—including his participation in an event that resulted in the death of 13 others—were not relevant to this finding. Opp. 14-15. On the basis of this observation, the government asserts that the Board's legal determination is correct. *Ibid.*

Setting aside the government's failure to engage with the regulatory text, this argument is deeply flawed on its own terms. The government cannot divorce evidence of petitioner's in-service stressor from his PTSD diagnosis. According to the VA itself, "one cannot make a PTSD diagnosis unless the patient has actually met the 'stressor criterion,' which means

that he or she has been exposed to an event that is considered traumatic." Matthew J. Friedman, MD, PhD, *PTSD History and Overview*, Nat'l Center for PTSD, U.S. Dep't of Veterans Affairs, https://www.ptsd.va.gov/professional/treat/essentials/history_ptsd.asp. In DSM-5, on which the VA relies, "criterion A" for a PTSD diagnosis is presence of a "stressor." *Hicks* v. *Shulkin*, 2017 WL 6617125, at *3 (Vet. App. 2017).[5] While the presence of a stressor may not be a sufficient basis to diagnose PTSD, it is undeniably "relevant" to that diagnosis in the ordinary sense of the word.

To the extent the government offers a legal standard, it is that, to qualify as "relevant," the records must "cast doubt" on the earlier decision. Opp. 15. See also Opp. 7. For the reasons we just explained, petitioner's overlooked records do tend to "cast doubt" on the VA's earlier finding that petitioner did not have PTSD. More to the point, the government never explains the textual basis on which it draws its "cast doubt" test. No textual support exists. The regulation speaks broadly of records that are "relevant"—and it specifically defines "relevant" records as including "[s]ervice records that are related to a claimed in-service event." 38 C.F.R. § 3.156(c)(1)(i).[6]

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[5] See also *O'Donnell* v. *Shinseki*, 2012 WL 1660827, at *1 (Vet. App. 2012) ("A VA medical examination * * * concluded that he 'does not meet DSM–IV criteria for the diagnosis of PTSD, in terms of a specific, identified stressor that meets Criterion A, which is required for the diagnosis to be made.'").

[6] The government's reference (Opp. 15) to the use of the term "relevant" in an unrelated statute, 38 U.S.C. § 5103A(b)(1), which describes "relevant private records," only reinforces our argument. Citing Federal Circuit precedent, the government

Section 3.156 as a whole, moreover, refutes the government's argument. See Pet. 22. Section 3.156(a), which permits the VA to "reopen" a claim, requires a veteran to show "new and material evidence." "Material evidence" is "evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." 38 C.F.R. § 3.156(a). And "new and material" evidence does not include evidence that is "cumulative" or "redundant" of what was previously considered. *Ibid.* That is, "new and material" evidence is evidence that would "cast doubt" on the VA's prior decision.

In construing "relevant" as used in Section 3.156(c), the government seeks to import the "new and material" standard from Section 3.156(a). But the government has no textual basis for doing so. The regulation's use of different language within the same Section reflects a conscious choice. The term "relevant" as used in Section 3.156(c) must mean something different than "new and material." In fact, Section 3.156(c) previously *did* contain the "new and material" standard. In 2005, the VA amended the regulation to replace it with a broader standard turning on "relevant" evidence. See 70 Fed. Reg. 35,388.

Disregarding the text entirely, the government's only apparent answer is made-up policy. "[I]t would be illogical," the government posits, "to interpret 'relevant' in Section 3.156(c)(1) to set a *lower* threshold

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contends that "a record is not 'relevant' if it does not 'have a reasonable possibility of helping to substantiate the veteran's *claim*.'" Opp. 15 (emphasis added). The records here meet this test. Petitioner's "claim" is for PTSD disability benefits, one element of which is the presence of an in-service stressor. 38 C.F.R. § 3.304(f). These records "substantiate" this element.

for obtaining retroactive decisions than Section 3.156(a) establishes for reopening claims and obtaining non-retroactive decisions." Opp. 18.

This contention is wrong out-of-the gate, as the VA must still issue an "award" (38 C.F.R. § 3.156(c)(3)) for a veteran to receive any relief, subject to all the elements of the particular claim. Beyond that, there is an obvious—and entirely logical—reason to interpret the regulation in accord with its plain text. Section 3.156(c) (unlike Section 3.156(a)) applies only where, as the government puts it, the VA committed an "administrative error" (Opp. 19) by failing to consider records during its initial adjudication. Because Section 3.156(c) is remedial, it is sensible to interpret the regulation as resolving past VA errors in the veteran's favor—without requiring a speculative, counter-factual inquiry into what the VA may have done years or decades prior.

c. If any doubt remains, the pro-veteran canon should tip the scale for petitioner. Pet. 22. The government retorts that, because it has "by far the best interpretation of the pertinent rule," the veteran's canon has no role. Opp. 24-25. Needless to say, we disagree with the government's assessment of its case. The government asserts—without authority—that the canon may not apply to regulations. The Federal Circuit disagrees. *Hodge* v. *West*, 155 F.3d 1356, 1361-1362 (Fed. Cir. 1998). It would be bizarre indeed if the pro-veteran canon applied to Congress only—and not the VA.

3. The Court should also grant review of the second question presented. If, contrary to our principal argument, the Court retains *Auer*, it should confirm that *Auer* applies only after a court has exhausted

every other tool of construction, including the pro-veteran canon. This claim is not waived, as "[i]t is hard to imagine how a party can waive the question of the correct legal standard to apply." Pet. App. 53a. Finally, there is no conflict on the specific intersection of *Auer* and the pro-veteran canon (Opp. 24) because the Federal Circuit has jurisdiction over all veterans' appeals. 38 U.S.C. § 7292.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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NOVEMBER 2018